No. 92-47

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF MICHIGAN

Petitioner,

vs

JOSEPH THOMAS

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

DOES THE DOCTRINE OF "INEVITABLE DISCOVERY" APPLY TO A DEFENDANT'S STATEMENTS, AS WELL AS PHYSICAL EVIDENCE?

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OCTOBER TERM, 1991

STATE OF MICHIGAN

Petitioner,

vs.

JOSEPH THOMAS

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

NOW COMES the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, Timothy A. Baughman, Chief of Research, Training and Appeals, and Jeffrey Caminsky, Assistant Prosecuting Attorney, and pray that a Writ of Certiorari issue to review the judgment of the Michigan Court of Appeals, entered in this cause on October 21, 1991, rehearing denied January 6, 1992, leave to appeal denied by the Michigan Supreme Court on April 8, 1992, one justice dissenting.

OPINIONS BELOW

The Opinion of the Michigan Court of Appeals is reported at 191 Mich App 576; ___ NW2d ___ (1991), and appended below as Appendix A; the order of the Court of Appeals denying rehearing is unreported, and appended below as Appendix B; the order of the Michigan Supreme Court denying Respondent leave to appeal is reported at 439 Mich 974 (1992), and appended below as Appendix C.

STATEMENT OF JURISDICTION

The Michigan Court of Appeals issued its opinion on October 21, 1992, and denied rehearing on January 6, 1992; the Michigan Supreme Court denied leave to appeal on April 8, 1992. This Court's jurisdiction is invoked under 28 USC 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV to the United States Constitution provides, in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V to the United States Constitution provides, in pertinent part:

> "No person shall...be compelled in any criminal case to be a witness against himself...."

Amendment XIV to the United States Constitution provides, in pertinent part:

> "...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On March 12, 1975, following jury selection in their trial for first-degree murder, Respondent and his two co-defendants pleaded guilty to second-degree murder. On March 19, 1975, the trial court sentenced Respondent to concurrent prison terms of 40-to-100 years imprisonment. Respondent made no motion to suppress any evidence prior to his guilty plea.

Following several unsuccessful state court appeals, on July 7, 1986, a federal judge granted Respondent's petition for writ of habeas corpus, and ordered that he be granted a new trial. Docket No. 84-CV-4740-DT. On May 1, 1987, a divided Sixth Circuit Court of Appeals affirmed the granting of the writ. Docket No. 86-1706; 818 F2d 476 (CA 6, 1987). On October 5, 1987, the United States Supreme Court denied

the State's petition for writ of certiorari. Docket No. 87-89.

Prior to trial, Respondent moved to suppress certain physical evidence taken upon his arrest, together with statements given made to police on his way to the police station, claiming that the police lacked probable cause to arrest him. Testimony at the evidentiary hearing showed that informants and other "street sources" and "various other people" had told the police that someone with the street name "Hassen," who lived on Woodlawn was involved in the homicide. The arresting officer also testified that he had seen a teletype giving the names of three suspects for him to arrest, and that Respondent -- Joseph Hassen Thomas, of 8819 Woodlawn -- was one of the three. Furthermore, the police file contained a photograph of Respondent. The police then proceeded to arrest Respondent

in his home, having been admitted into the home by his mother.

In the process of arresting him, the police discovered a loaded .38 caliber revolver in his blanket. Respondent also made a statement in the squad car on the way to the police station, admitting his presence at the scene of the crime. Both were later admitted into evidence at trial.

During argument on the motion to suppress, the prosecutor claimed that the police had probable cause to arrest Respondent at the time, and that even if this were not so, the police were actively pursuing other leads that would have led inevitably to his arrest. The prosecutor also voiced objection to the fact that the Respondent had not raised the point in a timely fashion, prior to his 197 guilty plea.

At the conclusion of the evidentiary hearing, the trial court made the following ruling:

> "[U]nder the circumstances of this case, I'm going to rule with the Prosecution. I do not feel that in doing so, due process has been denied...in any respect. The arrest may... -- and I'm not saying that it was, but I think the best thing that one can say, it was a bit premature, if that can be said with any degree of accuracy.
>
> * * *
>
> "It seems to be that...I think the Prosecutor's right, it would have been done anyhow. And it seems to me that some consideration needs to be given to the fact that in this case all state remedies were exhausted, and in the federal courts it was return on the grounds of...ineffective assistance of counsel....
>
> * * *
>
> "No, I'm going to hold that the arrest was legal, valid.
>
> * * *
>
> "And the testimony is that Defendant had been advised of his rights by Officer Love. There's nothing in the record that would indicate that it was anything but voluntary. So your motion as it

> relates to the suppression of the statements...[and] to the legality of the arrest is denied. I'm holding tat the arrest was legal and the subsequent statements that I've heard on this record...are admissible."

During the course of trial, the prosecution introduced evidence that Respondent's fingerprints were found on a television set belonging to the victims, and found next door to the victim's house. Papers belonging to one of the victim's was found in a trash bag, also next door to the victims. Respondent was cradling a loaded .38 revolver at the time of his arrest. Blood stains matching one of the victim's was found on Respondent's coat, and hairs found on Respondent's shoes matched those from the other victim. Respondent's half-sister testified that she had seen Respondent and others in the house next door to the victim's on the evening of the murders, and that he (Respondent) was armed with a gun. A witness who lived next door

testified that on the night of the murders, Respondent and two others left the house -- she heard several gunshots -- and then the three men returned, each with a gun. One of the three men then said: "He saw me," "where are my bullets," and "I've got to go back." Then, all three men left again, and when then returned each again had a gun. (V, 674-675). Other testimony established that upon his arrest, Respondent stated that he had been at the victim's house but that "they" had done the shooting, and that this statement was essentially repeated at the police station.

On June 15, 1988, a Detroit Recorder's Court jury convicted Respondent of two counts of first-degree murder. On July 19, 1988, Respondent was sentenced to concurrent terms of life in prison without parole.

On October 21, 1991, the Court of Appeals reversed Respondent's conviction in

a published opinion, and remanded the cause for retrial. Docket No. 111910. The Court concluded that Respondent's arrest was unlawful, and that while the doctrine of "inevitable discovery" permitted the prosecution's use of physical evidence seized from Respondent's home and person, the doctrine did not extend so far as to permit the use of his statements. The Court also rejected Petitioner's claim that Respondent's failure to raise the matter in timely fashion, during his initial appeal of right, waived any challenge to his arrest.

Petitioner seeks now seeks certiorari.

REASONS FOR GRANTING THE WRIT

This case gives the Court the chance to review a novel question, concerning application of the "inevitable discovery" rule. For a variety of reasons, Petitioner submits that the Michigan Court of Appeals erred in its resolution of both issues, and that this Court should intervene to delineate the proper standard of review -- and to correct a mistake occasioned by the untimely intervention of a federal court in the matter.

A.

THE COURT OF APPEALS ERRED IN FINDING THE DOCTRINE OF "INEVITABLE DISCOVERY" INAPPLICABLE TO A DEFENDANT'S CONFESSION.

In its opinion, the Court of Appeals found that the police arrested Respondent before they had obtained probable cause.[1]

---

1 Petitioner disputes the notion that the

Recognizing that the police were developing abundant leads which justified his detention within a matter of hours, the Court rejected Respondent's claim that certain items seized from his home were obtained unlawfully, on the strength of this Court's holding in Nix v Williams, 467 US 431; 104 S Ct 2501; 81 L Ed 2d 377 (1984). However, citing an Alaska Decision that predated the holding in Nix,[2] the Court also held that

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1 Continued
police arrested Respondent without probable cause to do so. However, given the fact that the State court of appeals permitted Respondent to raise the matter after the Federal courts overturned his conviction -- well after the time for raising the matter in a timely fashion, and after most of the evidence surrounding the circumstances of his arrest had vanished with the fading memories of the witnesses -- this aspect of the case is not before the Court.

2 In Unger v State, 640 P2d 151 (Alas App, 1092), the Alaska Court of Appeals rejected the notion that a defendant's confession could be regarded as "inevitable." However, the court looked to whether "the government undoubtedly would have discovered the tainted evidence by lawful means," Unger, at 158, rather than the "preponderance of the evidence" test this Court adopted in Nix. In addition, the Alaska prosecutor conceded

the doctrine had no general application to a defendant's admissions, and ordered Respondent tried because of the admission to the arresting officers on the way back to the police station.

In Nix, this Court held that -- even assuming police violate the Fourth Amendment in obtaining evidence -- when they prosecution can demonstrate "by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means," Nix, at 444, then the deterrence rationale of the

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2 Continued
the point away, basing his argument on police "good faith" instead.

Even so, the Unger court -- along with courts in other cited cases -- all looked to the evidence to determine the point. They did not reject the notion of inevitable discovery in the context of confessions -- nor look to a lack of evidence on the existing record, stemming from the fact that the trial court rejected the claim of unlawful arrest in the first place, as did the Michigan Court of Appeals.

exclusionary rule evaporates, and a court should admit the evidence. "Anything less," Chief Justice Burger wrote for the majority in Nix, "would reject logic, experience, and common sense." Ibid.

As the facts in this case show that Respondent's arrest was only a matter of time, the conclusion that his statement was in any way related to the premature nature of the arrest is entirely speculative: as Respondent freely confessed his involvement in the murder upon his arrest, it is likely that he would have done so at any time following the initiation of custody. It is, after all, unlikely that a suspect's motivation to speak will be greatly affected by the timing of his arrest; many confessions stem from conscience, many others from a hope to minimize one's criminal exposure -- and neither motivation

is affected by the timing of the arrest. Moreover, given the loss of critical evidence on the point due to Respondent's failure to raise the matter in a timely fashion, the conclusion that the State actually violated his constitutional rights is entirely speculative -- the conclusion that Respondent would have remained silent if arrested subsequently is entirely speculative -- yet the loss of evidence is painfully real. And in the absence of a demonstrable causal nexus between the taint and the evidence obtained, there is nothing to be gained by excluding the evidence; and, under the circumstances, the trial court acted within its constitutional prerogatives in declining to exclude the evidence.

Even if this Court chooses to limit its attention to the application of the inevitable discovery, this Court would find the instant case well worth its

attention.[3] Accordingly, Petitioner requests this Court to grant the petition, and review the holding of the Court of Appeals.

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[3] Petitioner also notes that, given the overwhelming nature of the proofs -- and the virtually identical statement Respondent gave in the basement of police headquarters -- any error in admitting the initial statement was harmless error. See, eg, New York v Harris, 495 US ___; 110 S Ct ___; 109 L Ed 2d 13 (1990); Arizona v Fulminante, ___ US ___; 111 S Ct 1246; ___ L Ed 2d ___ (1991).

CONCLUSION

WHEREFORE, Petitioner prays that this Court grant plenary review, reverse the holding of the Michigan Court of Appeals, and reinstate Respondent's conviction for first-degree murder.

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Dated: June 11, 1992
JC/eb

APPENDICES "A"

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

October 21, 1991
9:25 a.m.
FOR PUBLICATION

NO. 111910

JOSEPH THOMAS,

Defendant-Appellant.

Before: Gillis, P.J., and Sawyer and Reilly, J.J.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of first-degree felony murder. MCL 750.316; MSA 28.548. He was sentenced on his convictions to serve life in prison. He now appeals and we reverse.

The murders which give the rise to defendant's convictions occurred on December 6, 1974. Defendant was charged in those murders shortly after their commission and pled guilty to two counts of second-degree

murder on March 12, 1975, and was sentenced to serve forty to one hundred years in prison on each count. Following various unsuccessful appeals to this Court and the Supreme Court and an attempt to withdraw his guilty plea in the trial court, defendant was able to obtain habeas corpus relief in 1987, resulting in the withdrawal of his guilty plea and his trial on the instant charges. A trial was conducted in July 1988, resulting in defendant's instant convictions.

Defendant raises a number of issues on appeal, one of which is dispositive. Defendant argues that his initial arrest was unlawful and, therefore, certain physical evidence seized following his arrest as well as statements made by defendant to the police following his arrest should have been suppressed. We agree that defendant was unlawfully arrested and that the statements made by him to the police following that

arrest should have been suppressed, but do not agree with defendant that the physical evidence should have been suppressed.

The police arrested defendant at this residence without a warrant. Defendant argues that the police lacked probable cause to make an arrest. We agree. A police officer may arrest without a warrant if he has reasonable (or probable) cause to believe that a felony has been committed and that the suspect committed the felony. MCL 764.15; MSA 28.874. Probable cause to arrest exists if the facts are available to the officer at the moment of arrest would justify a fair minded person of average intelligence to believe that the suspected person has committed a felony. People v Oliver, 417 Mich 366, 374; 338 NW2d 167 (1983). The only facts known to the police at the time of defendant's arrest concerning defendant's involvement in the murders were that an unnamed street source of one of the

officers had said that the "word on the street" was that an individual named "Hassen" living on the same street as defendant was involved in the murders, that defendant's middle name is Hassen, and that defendant was wanted for questioning in the case because of his known association with two other suspects in the murders, General Dorsey and Jeffrey Dorsey (a neighbor of the victims).

This evidence does not establish probable cause to make an arrest. The mere fact that defendant is a known associate of two suspects in the killing, while perhaps grounds to make defendant also a suspect, does little to establish defendant's involvement in the murder. Further, the fact that an unidentified informant told an officer that the "word on the street" was that an individual with the same name as defendant's middle name was involved in the crime also fails to establish probable cause. First, the officer declined to

identify his source, and did little to establish the source's credibility other than pointing out that the source was not in custody at the time of supplying the information, nor was there any evidence to corroborate the accuracy of the source's information. Indeed, the officer's testimony was that the source told him that the "word on the street" was that a person by the name of Hassen who lived on the same street as defendant was involved in the murder. There is no indication that the source spoke from personal knowledge that Hassen was involved in the murder. Rather, the source merely indicated that he had heard that Hassen was involved, from individuals who apparently were not even identified to the police officer, let alone whose identities were divulged in court.

Rumor and a known association with other suspects in a case, while certainly justifying investigation by the police into

an individual's involvement in a crime, do not establish probable cause to believe that the person was involved in the commission of the offense. See Oliver, supra at 366 (to establish probable cause based upon information is reliable and that the information is based on something more substantial than casual rumor). Accordingly, we conclude that the trial court clearly erred in finding that probable cause existed to arrest defendant.[2]

The prosecutor also appears to argue that the statements made by defendant following his arrest as well as the physical evidence recovered in connection with defendant's arrest are admissible under the inevitable discovery exception to the exclusionary rule.[3] While the evidence obtained as a result of defendant's unlawful arrest would normally be suppressed under the fruit of the poisonous tree doctrine, it may nevertheless be admissible if the

prosecution can show that the same evidence would have been inevitably discovered despite the unlawful police conduct which results in the application of the exclusionary rule. Nix v Williams, 467 US 431; 104 S Ct 2501; 81 L Ed 2d 377 (1984).

Nix represents the second time that that case was before the Supreme Court. In an earlier opinion in the case, Brewer v Williams, 430 US 387; 97 S Ct 1232; 51 L Ed 2d 424 (1977), the Supreme Court granted Williams a new trial, concluding that his right to counsel had been violated. In Brewer, a ten-year-old girl had been murdered and Williams had been arrested for that murder prior to the discovery of the body. While transporting Williams from the place of arrest back to Des Moines, where the abduction had occurred, one of the officers gave Williams what has become known as the "Christian burial speech." The officer pointed out to Williams that a snow storm was coming which would make it

impossible to find the body and that the parents of the victim should be entitled to a Christian burial for their daughter who had been abducted on Christmas Eve and murdered. As a result of the speech, Williams directed the officers to the body. Having concluded that the conduct of the officers violated Williams' right to counsel, the Supreme Court concluded that incriminating statements themselves, as well as any testimony by the police concerning the fact that Williams had led them to the body, could not be admitted into evidence.

The Court, however, left open the question whether evidence of where the body was found as well as the condition of the body could be admitted on the theory that the body would have been discovered in any event. Id. at 406, n 12. On retrial, the state trial court found that the body would have inevitably been discovered and allowed the evidence of the discovery of the body and condition of the body at trial.

Ultimately, the United States Supreme Court concurred in this conclusion in Nix, concluding that the body would have inevitably been discovered based upon the fact that an intensive search for the body was in place approximately 2-1/2 miles from where the body was, proceeding to the area where the body was located.

In the case at bar, the prosecutor suggests, and the trial court had concluded, that defendant inevitably would have been arrested based upon evidence which was developed by the police following defendant's arrest and independent of defendant's arrest. Specifically, the police obtained statements from witnesses that placed defendant in the area of the homicide at sometime before the homicide and fingerprint analysis of latent prints recovered from property stolen from the victim's house matched defendant's fingerprints, with the police having possession of a fingerprint card for

defendant from a prior arrest. We agree that this evidence, combined with the knowledge the police already had concerning defendant's known involvement with the Dorsey brothers and the information obtained by the street informant, would yield probable cause to have arrested defendant at the subsequent time. Similarly, we are satisfied that a search would have been conducted at that subsequent time which would have yield the physical evidence obtained. Accordingly, the inevitable discovery doctrine can be applied to justify the admission into evidence of the physical evidence seized at the time of defendant's arrest and subsequent to that arrest. To this extent, the trial court's decision was not clearly erroneous. People v Martinez, 187 Mich App 160, 171; 466 NW2d 380 (1991).

This, however, does not resolve the question whether defendant's statements to the police should have been suppressed from evidence. The prosecutor cites no case in

which the inevitable discovery doctrine has been applied to a defendant's statements.[4] On the other hand,, defendant has cited no case in which the application of the inevitable discovery doctrine to statements has been considered. Our own research of the issue did not reveal any Michigan cases which have addressed this issue, and few cases from foreign jurisdictions as well. The only case which we have discovered which squarely addr sses the issue is Unger v State, 640 P2d 151 (Alas App, 1982). In Unger, the Alaska Court of Appeals noted that "a confession cannot normally be considered the type of evidence that inevitably will be 'discovered' by legal, predictable police procedures." Id. at 159. Indeed, the Alaska court noted that the inevitable discovery doctrine permits the state to introduce evidence that is the result of an illegal search or seizure upon a showing that the government would undoubtedly have discovered the tainted

evidence by law means, citing Kamisar, LaFave & Israel, Modern Criminal Procedure (4th ed, 1974), p 702. Unger, supra at 158.

Also of interest in State v McKendall, 36 Or App 187; 584 P2d 316 (1978), which was relied upon in part by the Unger court, wherein the Oregon Court of Appeals declined to apply the inevitable discovery doctrine to the admission of a confession. Although the court did not explicitly state that the inevitable discovery doctrine does not apply to confessions, the court did note that there was nothing in the record to support a finding that the defendant's statement inevitably would have been made and, therefore the exception did not apply. Id. at __; 584 P2d 320. Similarly, in State v Anderson, 160 Wis App 2d 307; 466 NW2d 201 (1991), the Wisconsin Court of Appeals rejected the application of the inevitable discovery doctrine to find a confession admissible, but again did so on the basis that the facts did not support a finding of

inevitable discovery without direct consideration of the question whether the inevitable discovery doctrine applies to confessions. This was also the result in an earlier Oregon Court of Appeals decision, State v Paz, 31 or App 851; 572 P2d 11036 (1977), in which the court concluded that the defendant's statements would not inevitably have been discovered and, therefore, should not have been admitted. The court did not, however, address the threshold question of whether the inevitable discovery doctrine is applicable to confessions or other statements by a defendant.

We agree with the Alaska court that the inevitable discovery doctrine cannot ordinarily be applied to justify the admission into evidence of a tainted confession. Even through it can be shown that defendant would eventually have been arrested, that does not lead to the conclusion that it is inevitable, without

speculation, that defendant would have made the same statements to the police that he did in fact make following his unlawful arrest. It is simply too speculative to conclude that, following the passage of some time, defendant would necessarily have made the same statements to the police that he made initially. Defendant may have learned of the arrest of the Dorsey brothers and, with time to reflect, have consulted counsel who would have advised him to remain silent, or on his own considered the possibility of being arrested and the need to remain silent, and, for that matter, the manner in which the arrest was conducted could impact on defendant's willingness to make a statement. See Unger, supra at __; 640 P2d 159. To conclude that a person would make the same statement under different fact situations requires, in essence, both the ability to read the defendant's mind to ascertain why he was willing to make the statement in the first place and a degree of

prognostication concerning whether th willingness would extend to a different fa situation which would ordinarily be beyo the power of either the prosecutor or t court to perform.

We stop short, however, of saying th the inevitable discovery doctrine can nev be applied to justify the admission of statement by the defendant as we allow the possibility that some such fa situation would be rather unusual and wou involve unique factual situations. In a event, the prosecutor has made no showing this case that there is any reason believe that defendant would inevitably ha made the same statements following subsequent lawful arrest made sometime af the unlawful arrest in the case at ba Accordingly, we conclude that the tri clearly erred in failing to suppress evidence statements made by defenda following his arrest.[6]

For the above reasons, we conclude that the trial court erred in denying the suppression of defendant's statements. Therefore, defendant is entitled to a new trial.[7]

One other issue raised by defendant merits brief consideration as it affects the question whether retrial is appropriate. Defendant argues that the prosector lacked the authority to retry defendant on the first-degree charge in light of his earlier plea to second-degree murder. Defendant is correct that the Supreme Court in 1973 adopted a rule that a defendant who pleads guilty to a lesser-included offense and later has the plea set aside may not be tried on a greater offense than that to which he pled. People v McMiller, 389 Mich 425; 208 NW2d 451 (1973). The McMiller rule was reaffirmed by the Court in People v Thornton, 403 Mich 389; 269 NW2d 192 (1978). However, the Supreme Court abandoned the McMiller rule by its adoption

of GCR 1963, 785.(7)(d), effective March 1, 1984, which provides that if a defendant elects to withdraw a plea, the case may proceed to trial on any charges that had been brought or could have been brought against the defendant if the plea had not been entered. See 418 Mich lxxxvi. That provision may now be found in MCR 6.312, the staff note to which recognizes that the court rule removes the prohibitions established by McMiller and Thornton. Michigan Court Rule 6.312, Note, R 63-7. Although McMiller was in effect at the time defendant tendered his original guilty plea, it had been abandoned prior to the time defendant obtained habeas corpus relief and was retried on the first-degree murder charges. Accordingly, we conclude that defendant was subject to retrial on the higher charge, the McMiller rule no longer being applicable.

Defendant also raises two issues in a supplemental brief filed in propria persona.

In light of our resolution of the first issue, we need not consider the issues raised in that brief.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ John H. Gillis

/s/ David H. Sayer

/s/ Maureen Pulte Reilly

[1] A search of Jeffrey Dorsey's home earlier in the day of defendant's arrest had revealed property missing from the victim's home.

[2] We also note, though not argued by the parties, that even the existence of probable cause would not alone justify defendant's arrest since he was arrested in his residence without a warrant. Absent exigent circumstances, the police must possess an arrest warrant before entering a suspect's residence to effect an arrest. Oliver, supra at 376, citing Payton v New York, 445 US 573; 100 S Ct 1371; 63 L Ed 2d 639 (1980). We do note that the police were granted admittance to defendant's house by his mother, with whom defendant apparently lived, but we do not speculate on whether the mother's permission to enter the house

was sufficient to justify arresting defendant in his residence without a warrant.

[3] The prosecutor's brief spends exactly one sentence on this issue, asserting that defendant's arrest was inevitable. Additionally, the trial court in ruling on this issue did not that "it [the arrest] would have been done anyhow." While we address this issue, appellate review was certainly not enhanced by the prosecutor's failure to more fully develop his argument in this area.

[4] In fact, the only inevitable discovery case cited by the prosecutor is Nix, supra, which, of course, concerned the inevitable discovery of physical evidence.

[5] For example, had, unknown to the arresting officers, another officer in the department obtained a warrant for defendant's arrest and arrived at defendant's residence moments after the warrantless arrest was conducted, it might be valid to conclude that there is not reasonable distinction between the arrest without a warrant and an arrest a few moments later with the warrant and, therefore, any statement made by defendant subsequent to the arrival of the warrant would be admissible. Obviously, this is a rather unique fact situation and certainly is not the case presented here.

[6] We do note that this does not preclude the proof of the facts contained within the statement from sources other than the statement itself. See McKendall, supra at ___; 584 P2d 320. Indeed, this is the

result obtained in Brewer and Nix, with the statements by Williams being suppressed from evidence, but the content of those statements, the location of the victim's body, being admission through other evidence.

[7] We briefly consider the prosecutor's argument that defendant has waived consideration of this issue by not having timely raised it a the time of his original plea. The prosecutor's argument in this regard is wholly without merit. The case primarily relied upon by the prosecutor in support of this argument, People v Brady, 139 Mich App 688; 363 NW2d 8 (1984), is simply not on point. In Brady, the defendant sought a series of appeals and motions for new trial from the same conviction, raising his issues piecemeal rather than in the same proceeding. In the case at bar, this matter is before us on defendant's direct appeal from his conviction. Moreover, the issue of the lawfulness of defendant's arrest did not arise at a prior trial inasmuch as no prior trial had been conducted, since defendant's prior conviction was obtained by plea. The other cases cited by the prosecutor in support of this argument are similarly not on point, involving the requirement that an objection be made at trial in order to preserve an issue for appeal as well as the law-of-the-case doctrine, neither of which are applicable to this case. Defendant did preserve the issue of the lawfulness of his arrest at trial and the lawfulness of defendant's arrest or the need to suppress evidence derived from the unlawful arrest. The prosecutor's position might have some merit had defendant's prior conviction followed a trial and defendant took an appeal from that conviction and did not

challenge the lawfulness of his arrest or the admission of the evidence obtained from that arrest. In such a circumstance, it might be appropriate to conclude that defendant waived the issue in further proceedings of the case if a reversal had been obtained on other grounds. See, e.g., VanderWall v Midkiff, 186 Mich App 191; 463 NW2d 219 (1990).

APPENDICES "B"

Court of Appeals, State of Michigan

ORDER

People of Michigan v Joseph Thomas

JOHN H. GILLIS
Presiding Judge

Docket # 111910 David H. Sawyer

L.C. # 74-009753 Maureen Pulte Reilly
Judges

The Court orders that the motion for rehearing is DENIED.

J. H. Gillis

A true copy entered and certified by Daniel F. Walsh, Chief Clerk, on

(SEAL)

Jan 6 1992
Date

Daniel F. Walsh
Chief Clerk

APPENDICES "C"

Order

Michigan Supreme Court
Lansing, Michigan

Entered: April 8, 1992

93099

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SC: 93099
COA: 111910
LC: 74-09753

JOSEPH THOMAS,

Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Boyle, J., would grant leave to appeal.

20402

CORBIN R. DAVIS, Clerk of the Michigan Supreme Court.

(SEAL)

April 8, 1992 Corbin R. Davis